

YOU CAN ONLY WRITE ONCE – RIGHTS TO AUTHORSHIP, INSPIRATION  
AND TRANSFORMATION IN THE CHOSEN JUDGEMENTS  
OF THE U.S. COURTS INVOLVING THE COPYRIGHTS  
ON THE JAMES BOND CHARACTER

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Although at first glance law and arts do not seem to have not much in common, in fact there is a significant research field in the combination of both. The first important one is constituted by the observation of how the functioning of law is presented in the works of art, which is most likely depicted within 'law and literature' studies. Another one, which would be analysed within this article, is the scope of legal protection offered by copyright law, which is, however, available only upon positive effect of the analysis of artistic content from the perspective of the premises of the protective provisions.

The chosen subject of the analysis as above is undeniably a phenomenon of cinema, which strongly influenced more than half of its history. James Bond's film adventures based on novels by Ian Fleming, filmed for the first time in 1953 (*Casino Royale*) and for the last one in 2015 (*Spectre*), altogether for twenty-four times officially, with two of its series ranked among fifty best-earning movies<sup>1</sup>, deserve a prominent place as a part of film history. Though James Bond is claimed to be one of the most recognisable characters<sup>2</sup>, while its film series is regarded as most successful<sup>3</sup>, or a series of phenomenal impact on television industry<sup>4</sup>. It can be analysed not only as a source of joy and fun, and escape from everyday life<sup>5</sup>, but also because of its observation of development of global politics<sup>6</sup>, support of British national morale<sup>7</sup>, and specific attitude to women<sup>8</sup>. The character, although relative-

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1 *Skyfall* on the 18<sup>th</sup> place with app. \$ 1,1 bln and *Spectre* on the 48<sup>th</sup> place with app. \$ 0,9 bln <http://www.boxofficemojo.com/alltime/world/>.

2 HANDLER (2011), par. 2.

3 NEUENDORF, GORE, DALESSANDRO, JANSTOVA, SNYDER-SUHY (2010), p. 758.

4 MONIOT (1976), p. 25.

5 NEUENDORF, GORE, DALESSANDRO, JANSTOVA, SNYDER-SUHY (2010), p. 759.

6 RACIOPPI, TREMONTE (2014), p. 17.

7 BERBERICH (2012), p. 14.

8 NEUENDORF, GORE, DALESSANDRO, JANSTOVA, SNYDER-SUHY (2010), p. 759.

ly coherent, throughout subsequent series gradually adapts<sup>9</sup> to the current times. The scope of the latter can, however, be discussed as leading to a slow rejection of its specificity.

At the same time it must be noted that years of those movies' production involved numerous situations doubtful from the perspective of infringement of copyrights on James Bond character, which were subject to analysis in front of U.S. courts. The content of books and movies as such is certainly protected, but it is also the character of James Bond itself, independently from the work in which he is presented, that is deemed to have been a subject of copyright.

In order to establish infringement, two premises are taken into consideration<sup>10</sup>. The first is the copying of original work. From the perspective of the fictional character, which is here especially interesting, a necessary analysis regards the specificity of James Bond character. The second one is the ownership of copyright. Thus, the struggle between the successors of Ian Fleming and of the screenwriter on the scope of copyright ownership of each of them, which extended throughout most of James Bond filming history, shows the legal side of the development of the James Bond character into a symbol of modern cinema. Both of those issues will be subject to analysis in this article which on those examples will show the way of usage of legal tools to analyse art.

### *1. Subject of copyright protection from the perspective of James Bond character*

At first, however, the general scope of copyright protection in the American law must be stressed. It is, though, its regulation which will give base to the analysis of art on example of James Bond character.

To some extent the copyright in connection with other intellectual property rights is constitutionally guaranteed. Article 1 paragraph 8 clause 8 of the U.S. Constitution states that:

«[T]he Congress shall have power [...] to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries».

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9 MONIOT (1976), p. 27, RACIOPPI, TREMONTE (2014), p. 17.

10 Feist, p. 361.

The subject of the copyright protection is detailed in section 102 of the Copyright Law of the United States<sup>11</sup>, which says that:

«(a) [c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; [...] (6) motion pictures and other audiovisual works; [...].

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work».

This definition of the copyrightable object bases on the concept of protection of originality, which is thoroughly described in a U.S. Supreme Court judgement in *Feist Publications Inc. v. Rural Telephone Service Company Inc.*, treated as fundamental to define this concept<sup>12</sup>. Then it is primarily named as the constitutional requirement of copyright and its *sine qua non*<sup>13</sup>, or as a source of protection of copyright<sup>14</sup>.

Such originality means that a work must have at least a minimal degree of creativity, a slight amount, at least a 'creative spark'<sup>15</sup>, or, in other words, a *de minimis* quantum of creativity<sup>16</sup>. Sometimes it is, however, still claimed that the scope of originality must not be too trivial or insignificant<sup>17</sup>. From the yet another perspective, creativity does not have to be shocking, it is enough when it is perceptible<sup>18</sup>. This demand does not necessarily mean that a protected work must be produced with a special effort<sup>19</sup>. Following this criterion, only those components of work that are original might be protected<sup>20</sup>.

The protection does not extend to the idea, or concept. This means that from the perspective of the screenplay, the sheer plot should not be protected.

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11 U.S.C. Title 17, 1976.

12 PATRY (2017), 3.II.B.§3:37.

13 *Feist*, pp. 345-346.

14 *Harper*, pp. 547-548.

15 *Feist*, p. 345.

16 *Feist*, p. 363.

17 JOYCEM, LEAFER, JASTI, OCHOA (2005), p. 469.

18 PATRY (2017), 3.II.B.§3:27.

19 *Feist*, p. 362.

20 *Feist*, p. 348; *Harper & Row*, p. 548.

At the same time, under the abovementioned criteria, presentation of the plot or specific details of its author's rendering can be subject to protection, when it is original.

When it comes to a fictional character specifically, it is undeniably an essence of the story, with whom spectators identify<sup>21</sup>. A case study followed by C. Handler shows, however, that its protection, independently from the work in which they are present, demands meeting a difficult requirement of the complexity (or scope of development) of the character, which means that such a character constitutes the story being told and is not just 'the chessmen in the game of telling story'; or in other words, is not a limited pattern and therefore more of an idea or a concept, but a unique element of expression, even when constructed from more individually unprotected patterns, which is more likely under additional graphic presentation of such a character<sup>22</sup>. The latter criterion happens to overweigh the prior, so that a character presented graphically despite being based on a simpler pattern is more likely to be protected than a more complex character deprived of such presentation<sup>23</sup>.

Also<sup>24</sup> in order to grant a copyright on a work, it must have been independently created<sup>25</sup>. It does not have to mean novelty, but it must not be copying of someone else's work<sup>26</sup>.

## 2. *The issue of prohibited copying of the James Bond character*

Based on the criteria as above, the protection of the James Bond character independently from the entire work has been analysed in two cases in front of U.S. courts, the judgements in which will be subject to study in this article.

The first case was *Metro Goldwyn Mayer Inc. v. American Honda Motor Inc. Co.*<sup>27</sup>, in which preliminary injunction in favour of the copyright holder was granted on 29<sup>th</sup> March 1995. The plaintiff argued that the infringing material of its copyright on a James Bond character was a commercial produced by the defendant which could be described as done by the court, to be read below<sup>28</sup>:

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21 HANDLER (2010), par. 2.

22 See HANDLER (2010), part. 2-5 and sourced judgments to which she referred.

23 HANDLER (2011), par. 5.

24 Those factors must exist together, see PATRY (2017), 3.II.C.§3:31.

25 Feist, p. 345.

26 Feist, p. 358.

27 *Metro Goldwyn Mayer*, p. 1287.

28 *Metro Goldwyn Mayer*, p. 1291.

«“Escape” commercial features a young, well-dressed couple in a Honda del Sol being chased by a high-tech helicopter. A grotesque villain with metal-encased arms jumps out of the helicopter onto the car’s roof, threatening harm. With a flirtatious turn to his companion, the male driver deftly releases the Honda’s detachable roof (which Defendants claim is the main feature allegedly highlighted by the commercial), sending the villain into space and effecting the couple’s speedy get-away».

Although defendant asserted that plaintiff tried to gain an unacceptable and prohibited monopoly over the ‘action/spy/police hero’ genre, plaintiff claimed distinctiveness of the James Bond adventure in: «A high-thrill chase of the ultra-cool British charmer and his beautiful and alarming sidekick by a grotesque villain in which the hero escapes through wit aided by high-tech gadgetry»<sup>29</sup>. Experts invoked by the defendant, then, provided further characteristics of James Bond as a source of a genre itself rather than a continuation of a well-known genre of spy thriller, because of its general features of: *hybridize[d] the spy thriller with the genres of adventure, comedy (particularly, social satire and slapstick*<sup>30</sup> and particular elements: *protagonist, antagonist, sexual consort, type of mission, type of exotic setting, type of mood, type of dialogue, type of music*<sup>31</sup>. Eventually the court ruled in favour of James Bond character protection in general, as *audiences do not watch [...] James Bond for the story, they watch these films to see their heroes at work. A James Bond film without James Bond is not a James Bond film*<sup>32</sup>.

In order to establish infringement particularly on the side of the defendant, particular premises must have been examined.

The first one was defendant’s access to the original work. As obvious as it may be, because of James Bond world-wide popularity giving presumption of such access, it was also proven specifically because of James Bond initial name of the commercial hero (later given up) and initial attempts to cast James Bond-type actors<sup>33</sup>.

The second one was substantial similarity test under both extrinsic and intrinsic tests. With regard to extrinsic one it was held by means of comparison that specific protected elements of James Bond are alike with the ones presented in the commercial:

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29 *Metro Goldwyn Mayer*, p. 1294.

30 *Metro Goldwyn Mayer*, p. 1294.

31 *Metro Goldwyn Mayer*, pp. 1294-1295.

32 *Metro Goldwyn Mayer*, p. 1296.

33 *Metro Goldwyn Mayer*, p. 1297.

«(1) the theme, plot, and sequence both involve the idea of a handsome hero who, along with a beautiful woman, lead a grotesque villain on a high-speed chase, the male appears calm and unruffled, there are hints of romance between the male and female, and the protagonists escape with the aid of intelligence and gadgetry;

(2) the settings both involve the idea of a high-speed chase with the villain in hot pursuit;

(3) the mood and pace of both works are fast-paced and involve hi-tech effects, with loud, exciting horn music in the background;

(4) both [...] dialogues are laced with dry wit and subtle humor;

(5) the characters of [...] man are very similar in the way they look and act – both heroes are young, tuxedo-clad, British-looking men with beautiful women in tow and grotesque villains close at hand; moreover, both men exude uncanny calm under pressure, exhibit a dry sense of humor and wit, and are attracted to, and are attractive to, their female companions»<sup>34</sup>.

The intrinsic test, however, would analyse the substantial similarity of total concept and feel, which likely took place in the circumstances of the case<sup>35</sup>.

If the infringement is established, there is still a possibility to apply a defence in a fair use doctrine. This derives from the principal goal of copyright, namely to promote learning<sup>36</sup>, encourage creativity<sup>37</sup>. Though in the American law it is strongly underlined that copyright not only serves enforcement of rights, but their balance, and ultimately serves public – not author's – rights<sup>38</sup>. Those competing rights, that are to be balanced, may be named as flow of ideas, information and commerce versus interests of author<sup>39</sup>. It could be said, though, that right to inspiration bears particular importance in literature, and possibly film as well, as new works are usually and naturally an author's input to an existing literary tradition<sup>40</sup>. The fair use defence is now codified in sec. 107 of Copyright Law, which explicitly names four factors under analysis of its application:

«(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

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34 *Metro Goldwyn Mayer*, p. 1298.

35 *Metro Goldwyn Mayer*, p. 1299.

36 PATRY (2017), 10.I.§10:1:50.

37 JOYCEM, LEAFER, JASTI, OCHOA (2005), p. 469.

38 *Harper & Row*, p. 580 see also PATRY (2017), 10.I.§10:1:50.

39 *Harper & Row*, p. 580.

40 See: R. POSNER (1998), p. 403 cited by PATRY (2017), 3.II.C.§3:31.

- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work».

Those statutory factors do not, however, mean that initially flexible tool of common law, aimed to secure copyright aims, is constrained<sup>41</sup>. The content of particular premises, thus, allows for adjusting to the specificity of the case.

Despite obvious flexibility of the work character analysis, also the substantiality should be studied in accordance with qualitative, not quantitative, nature. In *Harper & Row Publishers Inc. v. Nation Enterprises* it is clearly stated that plaintiff must show substantial amount of copying, understood qualitatively, which in particular regards affecting the work 'heart'<sup>42</sup>.

In the *Metro Goldwyn Mayer* case the fair use defence, as described above, was dismissed<sup>43</sup>. It was clearly stated by the court that, due to infringed work's own unique niche in the action film genre, the substantiality of taking therefrom could have easily been established. The kind of fictional work also demanded more copyright protection than others. Additionally, infringing work, even understood as a parody, though not meeting a parody requirement of comment on the original work, still have not ceased to be a commercial. Moreover *it is likely that James Bond's association with a low-end Honda model will threaten its value in the eyes of future upscale licensees*<sup>44</sup>. The latter comment was agreed as of particular interest<sup>45</sup>. Also the harm on the side of MGM was claimed, by conjunction with BMW as to cars used in movies and by general value of their copyrights<sup>46</sup>.

This judgement was followed by *Danjaq LLC v. Universal City Studios LLC* in which planned movie of Section 6 was successfully challenged (as denial of defendants motion to dismiss) because of infringement of James Bond character copyright. It was in particular justified by the fact that the character, theme, plot, sequence, dialogue and also even a characteristic way of introducing of Alec Duncan as 'Duncan. Alec Duncan', alike to iconic, recognizable and significant phrase of 'Bond. James Bond', were understood as

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41 PATRY (2017), 10.I.§10:1:50.

42 *Harper & Row*, p. 565.

43 *Metro Goldwyn Mayer*, pp. 1299-1301.

44 *Metro Goldwyn Mayer*, p.1300.

45 PATRY (2017), 10.V.B.§10:34.

46 *Metro Goldwyn Mayer*, p. 1301.

challenging the defendants argument of *de minimis* character of copying<sup>47</sup>. It was also established that lacking parody or commentary character of Section 6, it would be just competing James Bond movies on a spy thriller film market<sup>48</sup>.

### 3. *The ownership of the James Bond character copyright*

Also the issue of ownership of the James Bond character – as a movie one derived from the literary one – was challenged in front of the U.S. courts. But its more careful analysis cannot rather be followed without the introduction to its adjudication offered by the judge of the US Court of Appeals for the Ninth Circuit in its judgment in case *Danjaq LLC v. Sony Corp. & McClory* (2006)<sup>49</sup>:

«[E]very so often, the law shakes off its cobwebs to produce a story far too improbable even for the silver screen – too fabulous even for the world of Agent 007. This is one of those occasions, for the case before us has it all. A hero, seeking to redeem his stolen fortune. The villainous organization that stands in his way. Mystery! International intrigue! And now, not least of all, the dusty corners of the ancient law of equity.

More specifically, this case arises out of an almost forty-year dispute over the parentage and ownership of a cultural phenomenon: Bond. James Bond. We are confronted with two competing narratives, with little in common but their end-point. All agree that James Bond – the roguish British secret agent known for martinis (shaken, not stirred), narrow escapes, and a fondness for fetching paramours with risque sobriquets – is one of the great commercial successes of the modern cinema. The parties dispute, however, the source from which Agent 007 sprang».

Coming to the core of the dispute, it must be said that there were two compelling parties arguing for the authorship of James Bond character, namely Danjaq LLC. and Metro Goldwyn Mayer Inc. which derived their rights from I. Fleming and film producers H. Saltzman and A. Broccoli, against Sony Corp. and K. McClory, who was a screenwriter of *Thunderball*. The latter asserted that by means of this screenplay *the supposedly violent and alcoholic James Bond of the Fleming books [was transformed] into the movie character who is so beloved, recognizable and marketable*, and at the same time it is «the source of the “cinematic James Bond” character, as opposed to the

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47 *Danjaq* (2014), par. 4-5.

48 *Danjaq* (2014), par. 5.

49 *Danjaq* (2001), p. 947.



literary James Bond character»<sup>50</sup>. It was also this screenplay which Fleming transformed into his book *Thunderball* (to which he admitted and in 1963 settled the dispute with McClory, who also acquired exclusive rights to filming the *Thunderball* novel)<sup>51</sup>.

Next, McClory granted license to Danjaq to make movies based on his screenplay. When the license term lapsed, he challenged *Thy Spy Who Loved Me* in 1976, but eventually abandoned his activities to enjoin the release of the movie<sup>52</sup>.

Later McClory undertook further attempts against Danjaq and/or MGM, but never in form of a litigation. Though he cooperated with *Never Say Never Again* coproduced by Warner Bros. in 1983, independently from Danjaq and/or MGM, but still it was as a “*Thunderball*” remake, and its admissibility was eventually accepted by the court<sup>53</sup>. Since then never tried to execute his rights to a James Bond character.

Generally McClory’s rights to a James Bond character were never questioned, but so did their relation to Fleming’s rights. As a joint author of James Bond character (which results from his co-authored Preliminary Script Materials, along with Ian Fleming), this joint ownership regarded only the joint-derivative work of scripts based on pre-existing material (source) by Ian Fleming in form of his *First Seven Novels*<sup>54</sup>. The scope of usage of Fleming’s material is, however, doubtful. Generally it was claimed that James Bond movies are primarily using Fleming’s character, but not the plot, which was transformed by Fleming and McClory jointly<sup>55</sup>. At the same time it is questioned, whether humorous movie Bond is alike with serious literary Bond<sup>56</sup>.

Also it is worth noted, which was also invoked by the court in the *Metro Goldwyn Mayer* case, that there was a preliminary injunction against McClory in *Danjaq LLC v. Sony Corp.* (1998)<sup>57</sup>, by which, lacking consent of MGM and Danjaq, McClory in cooperation with Sony (which acquired McClory’s rights<sup>58</sup>, was not allowed to produce his own James Bond movie. As a joint

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50 *Danjaq* (2001), p. 949.

51 POLIAKOFF (2000), par. I.

52 *Danjaq* (2001), p. 949.

53 POLIAKOFF (2000), par. I.

54 *Danjaq* (1998), par. 2.

55 POLIAKOFF (2000), par. I.

56 POLIAKOFF (2000), par. IV, see also MONIOT (1976), pp. 26-7.

57 *Danjaq* (1998), *Introduction*.

58 POLIAKOFF (2000), *Introduction*.

author McClory could have used the joint work independently, but this regarded the scripts only, and only to the extent that they were not infringing Ian Fleming's rights to the pre-existing material (as scripts were a derivative work from novels)<sup>59</sup>. A new James Bond movie from McClory was therefore subject to a preliminary injunction, as identical James Bonds will create confusion, while competing James Bond films could create harm on the side of plaintiffs<sup>60</sup>.

Based on long-term knowledge on the side of McClory about the activeness of Danjaq and MGM in producing numerous James Bond movies, which were, according to McClory, infringing his rights, he undertook legal action no earlier than in 2001. This was adjudicated as failing to fall under protection because of the laches defence, which is a common law *de facto* equivalent of the civil law institution of prescription. McClory's claims, regardless of their material basis, were unreasonably delayed<sup>61</sup>, which raised evidentiary difficulties and economic prejudice on the side of potential infringer<sup>62</sup>. Also there was no willful infringement on the side of Danjaq and/or MGM, which would except laches, as the nature of McClory's copyrights were highly unclear<sup>63</sup>.

Then, based on adoption of laches doctrine in the judgment it is highly likely that in legal terms this dispute will remain unsolved. This is why artistic analysis should resolve the problem, whose is James Bond character.

The analysis of copyright claims demands not only interpretation of legal terms ruling the adequate law (including from American law perspective not only statutory law, but also an especially significant role of judicature). It regards as well the artistic content, here by example of commonly popular and mostly beloved James Bond character.

Thus, this takes place by means of study especially on meeting the requirement of originality of the work in question, which can be assessed by means of comparison with other works as well as the scope of development and transformation of the particular work and/or its elements. Also the sheer feeling of the observer is not unimportant in this field. Then law can truly help supporting innovation and inspiration, but at the same time praise originality and authorship, defendable against copying.

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59 *Danjaq* (1998), par. 3.

60 *Danjaq* (1998), par. 4.

61 *Danjaq* (2001), pp. 952-955.

62 *Danjaq* (2001), pp. 955-956.

63 *Danjaq* (2001), pp. 956-959, especially p. 959.

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## Judicature:

- U.S. Supreme Court judgment in: *Feist Publications Inc. v. Rural Telephone Service Company Inc.* (1991), 499 U.S. 340;
- U.S. Supreme Court judgment in: *Harper & Row Publishers Inc. v. Nation Enterprises* (1985), 471 U.S. 539;
- U.S. Court of Appeals for Ninth Circuit judgment in: *Danjaq LLC. v. Sony Corp.* (2001), 263 F.3d 942;
- U.S. District Court C.D. California judgment in: *Danjaq LLC. v. Universal City Studios LLC* (2014), 2014 WL 7882071;
- U.S. District Court C.D. California judgment in: *Danjaq LLC. v. Sony Corp.* (1998), 49 U.S.P.Q.2d 1341;
- U.S. District Court C.D. California judgment in: *Metro Goldwyn Mayer Inc. v. American Honda Motor Inc. Co.* (1995), 900 F.Supp 1287.



# HISTORY OF LAW AND OTHER HUMANITIES

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